STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
(SMOLENSKI, P.J., and DOCTOROFF and OWENS, JJ.)

STEVEN J. VALCANIANT and KATHLEEN A VALCANIANT, his wife,

Plaintiffs-Appellants,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation, jointly and severally,

Defendant-Appellee.

Supreme Court No. 121141

Court of Appeals No. 227499

Lower Court No. 98-025040-NI(H)
Hon. NICK O. HOLOWKA

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

***** ORAL ARGUMENT REQUESTED *****

PROOF OF SERVICE

JOHN P. JACOBS, P.C.
BY: John P. Jacobs (P15400)
Lincoln G. Herweyer (P55742)
Attorney for Detroit Edison
Suite 600, The Dime Building
719 Griswold
P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

Kirsten L. DeGeer (P55508)
Office of the General Counsel
The Detroit Edison Company
2000 Second Ave., 688 WCB
Detroit, MI 48226
(313) 235-8288

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COUNTER-STATEMENT OF BASIS OF JURISDICTION

On March 17, 2000, Lapeer Circuit Court Judge Nick O. Holowka entered an Order denying a motion by Defendant, The Detroit Edison Company, seeking Summary Disposition pursuant to MCR 2.116(C)(8) and (C)(10) in this negligence action by Plaintiffs Steven J. Valcaniant and Kathleen A. Valcaniant. On May 8, 2000, the Trial Court entered an Order denying a timely motion for rehearing of its order denying summary disposition.

On September 11, 2000, the Court of Appeals granted Detroit Edison's application for leave to appeal on an interlocutory basis. from the denial of its motion for summary disposition. On February 19, 2002, the Court of Appeals issued an opinion reversing the Trial Court's ruling.

On March 25, 2003, this Court granted Plaintiffs' application for leave to appeal from the February 19, 2002 decision of the Court of Appeals. 661 NW2d 231. This Court thereafter has jurisdiction over this action pursuant to MCR 7.301(2).

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

DID THE COURT OF APPEALS CLEARLY ERR WHEN IT DETERMINED THAT THIS CASE WAS CONTROLLED BY THE PRINCIPLES ANNOUNCED BY THIS COURT IN GRONCKI, BOHNERT AND PARCHER AND THAT THOSE PRINCIPLES ENTITLED DETROIT EDISON TO SUMMARY DISPOSITION IN ITS FAVOR?

Plaintiff-Appellant must demonstrate that the Court of Appeals clearly erred and would say "Yes".

Defendant-Appellee says "No".

The Trial Court was not involved in this issue.

The Court of Appeals, obviously, said "No".

IS PLAINTIFF'S ARGUMENT REGARDING THE "VOLUNTARY ASSUMPTION OF A DUTY" DOCTRINE UNPRESERVED AND WHOLLY WITHOUT MERIT IN ANY EVENT?

Plaintiff-Appellant says "No".

Defendant-Appellee says "Yes".

The Trial Court was not involved in this issue.

The Court of Appeals did not address this issue.

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COUNTER-STATEMENT OF FACTS

Introduction

On February 19, 2002, the Court of Appeals (Smolenski, P.J., and Doctoroff, and Owens, JJ.) issued an Opinion (APX, pp 185a-186a) reversing a March 17, 2000 ruling by Lapeer Circuit Judge Nick O. Holowka (APX, pp 148a-149a) denying a motion for summary disposition by Defendant, The Detroit Edison Company (hereinafter referred to as "Detroit Edison"), in this action by Plaintiff, Steven J. Valcaniant, and his wife Kathleen A. Valcaniant.[1]

Plaintiff's action arose out of an injury which he brought upon himself when the gravel-hauler he hired to bring fill onto his property severed a twenty-six foot (26') high overhead power line by striking it with a raised dump trailer, positioned as it was at his own direction. Detroit Edison moved for summary disposition on the basis that, pursuant to the three cases decided sub nom Groncki v Detroit Edison, 453 Mich 544, 557 NW2d 289 (1996), an electric utility has no duty to warn of known overhead power lines or to move or to better insulate or to de-energize overhead power lines in the absence of a reasonably foreseeable risk of harm. Moreover, pursuant to that same trilogy of cases, under the circumstances of this case, the events leading to Plaintiff's harm were not reasonably foreseeable to Detroit Edison as a matter of law.

The Trial Court's articulated basis for denying Detroit

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[1] For ease of reference, and because Kathleen Valcaniant's claim is derivative of her husband's claim, in this Brief "Plaintiff" will refer only to Steven Valcaniant.

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Edison's motion for summary disposition was that it disagreed with Groncki, supra, and, in a surprising burst of candor, Judge Holowka said he preferred the dissenting opinion of Justice Levin in that case. (APX, pp 141a-145a.) In a bench ruling denying Detroit Edison's timely motion for reconsideration, the Trial Court reiterated its view that Groncki did not apply and that Judge Holowka was, instead, using "the traditional test" for determining the duty in a negligence case, notwithstanding the Supreme Court rule (APX, pp 176a-177a).

By contrast, the Court of Appeals, in its Opinion reversing the Trial Court's decision, found that this Court's decisions in Groncki and the companion cases of Parcher and Bohnert were controlling precedent. Applying the principles from Groncki, Parcher and Bohnert, the Court of Appeals concluded that "Defendant had no reason to foresee plaintiff's actions in this case. Because plaintiff's injury was not reasonably foreseeable, defendant owed plaintiff no duty to prevent it." (APX, p 186a.)

Plaintiff has sought and obtained from this Court leave to appeal. 661 NW2d 231. Detroit Edison now asks that this Court affirm the judgment of the Court of Appeals in its entirety.

Background

Since 1974, Plaintiff has owned a plot of land and has operated a used car business on that four-acre gravel lot in Imlay City, Michigan since 1987 (APX, pp 52a-53a). In June, 1995, he contracted with DeAngelis Landscape, Inc., to dump fill dirt at the rear of this property in order to raise the grade (APX, pp 58a-

61a).[2] Plaintiff estimated that, between June, 1995 and the date of his injury (August 15, 1995), more than one hundred (100) loads of dirt were dumped at the rear of his property (APX, p 61a). Since before Plaintiff purchased the property in 1974, clearly there to be seen, there have been electrical lines running along the back property line of Plaintiff's lot. There are no telephone lines on these poles, and Plaintiff estimated that there was between 200 and 300 feet between each pole. (APX, p 62a.) These lines were not in close proximity to any structure on Plaintiff's lot, and even after Plaintiff raised the grade, they were "air-insulated" by being twenty-five feet, ten inches (25', 10") above

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Stander that he would watch to make sure that he did not hit anything. (APX, pp 18a-19a, 37a-38a, 60a.) At the time, rainwater was still standing in puddles on Plaintiff's property and Plaintiff described the ground as soft and mushy and the weather as hot, humid, damp and muggy. (APX, p 62a.)

At Plaintiff's direction, Mr. Stander backed his truck between the utility pole and the guy wire to a point where the bed of the trailer was directly beneath the overhead wires, at which time Plaintiff instructed him to stop. (APX, pp 18a-19a, 37a-38a, 60a, 77a.) Plaintiff was standing six feet (6') or seven feet (7') from the truck and later testified that he was "all wet," there was "water on the ground," and he was "standing near a big large circle of water." (APX, pp 63a.)

After unlatching the trailer's tailgate, Mr. Stander began raising the trailer to release the fill. Plaintiff testified that as the trailer began to rise, it occurred to him that he might be in danger so he turned his back to the trailer to walk away, probably stepping right into the large puddle of water. (APX, pp 63a-64a.) Mr. Stander testified that he stopped raising the trailer when he thought it was near the electrical lines, but when the weight of the fill was released, the trailer rose up and struck the electrical line which fell down (APX, pp 19a-20a). Plaintiff heard a loud bang and "buzzing" and felt like he was "frozen". Plaintiff believes that he was released momentarily and fell into a puddle, and then received a second jolt. (APX, pp 64a-65a.)

Plaintiff later admitted that he had directed Mr. Stander to

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dump fill in the area directly beneath the electrical lines both on that day and on previous occasions. Moreover, Plaintiff conceded that he was aware of the dangers of power lines at the time of the accident. (APX, pp 66a, 78a.) Immediately after the accident, Mr. Stander had to physically help Plaintiff because he was "unstable and wobbly". Plaintiff recalled that, although his left arm was "sunburned" such that it "looked like a lobster," he was initially not concerned so much about himself as for contacting Detroit Edison to pass along his information about the downed electrical line. (APX, pp 21a, 66a, 79a.) Plaintiff further testified that he was aware of the location of those electrical lines for years, but he did not "pay any attention" to them (APX, pp 77a-78a).

Mr. Stander was also aware of the dangers of electricity. Indeed, Plaintiff testified that he warned Mr. Stander and his employer of the wires before the incident when they first started dumping fill in that area. (APX, p 81a.) Mr. Stander admitted that he was concerned about the downed wire and was familiar with Plaintiff's lot from delivering fill dirt there more than fifty (50) times previously (APX, pp 21a-24a, 78a p 123). Further, Mr. Stander was aware of the presence of the overhead power line directly above the site where he was dumping, and testified that Plaintiff not only directed him as to where to dump the fill, but "said he would watch me to make sure I didn't hit anything." (APX, pp 19a-20a.)[3]

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[3] It is respectfully submitted that these facts are important as they are virtually indistinguishable in legal substance from the trilogy of cases found in Groncki v Detroit Edison Co, 453 Mich

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Proceedings in the Trial Court

In his July 1, 1998 First Amended Complaint, Plaintiff stated separate counts of negligence against DeAngelis Landscape, Inc., and Detroit Edison (APX, pp 40a-46a). With regard to Detroit Edison, Plaintiff claimed that it had breached duties owed to him to: (A) use due care in the distribution of electricity; (B) obey all laws relating to the distribution of electricity; (C) properly train its employees regarding the distribution of electricity; (D) implement safety procedures designed to protect the life and property of someone in Plaintiff's position; (E) use care in re-energizing electrical lines to protect someone in Plaintiff's position; and (F) use electrical lines of a type designed to protect someone in Plaintiff's position (APX, pp 43a-44a).

On January 14, 2000, Detroit Edison filed a motion for summary disposition on the basis of a lack of duty to Plaintiff under the circumstances of this case, and requested that the Trial Court dismiss Plaintiff's claims. Detroit Edison argued that it was not reasonably foreseeable that Plaintiff would come into harmful contact with the lines in question and, therefore, Detroit Edison owed no duty to Plaintiff as a matter of law. More specifically, Detroit Edison argued that, under the uncontested facts of this case, and the well-established law in this area, Detroit Edison had no duty to de-energize or to better insulate the lines in question or to warn Plaintiff of their presence or otherwise safeguard him

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644, 557 NW2d 289 (1996); Bohnert v Detroit Edison Co, 453 Mich 644, 557 NW2d 289 (1996); and Parcher v Detroit Edison Co, 453 Mich 644, 557 NW2d 289 (1996).

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from coming into contact with them. (APX 102a-120a.)

In a February 14, 2000 response brief, Plaintiff did not contest that this accident was not reasonably foreseeable as a matter of law. Rather, Plaintiff argued that, assuming the occurrence of a downed power line, it was reasonably foreseeable that members of the public might come into contact with, and be injured by, such a line once downed and, therefore, Detroit Edison had a duty to automatically de-energize this line immediately after it was severed. More particularly, Plaintiff criticized Detroit Edison's use of a circuit breaking devise called a "recloser" to de-energize the line. (APX, pp 12b-13b.) In making this argument, Plaintiff characterized the de-energizing of the line by virtue of the recloser as a re-energizing of "a downed power line without first having determined the source or cause of the power interruption." (APX, p 12b.)

Nonetheless, Plaintiff affirmatively represented that he had abandoned most of his theories regarding "duties" owed by Detroit Edison to Plaintiff, stating:

> "Here, Mr. Valcaniant is not asserting Edison (1) owed a duty to warn of the presence of overhead power lines or that Edison (2) had a duty to move those power lines when the dumping activities of DeAngelis Landscape took place, or that Edison (3) owed a duty to warn him of the obvious danger of contact with those lines. Mr. Valcaniant, likewise, is not arguing (4) a duty was owed to him by Edison because somehow its lines were too low to the ground as asserted by Edison." [APX, p 11b]

On February 29, 2000, Detroit Edison filed a reply brief in support of its motion for summary disposition, noting that at a minimum the Court should dismiss those aspects of Plaintiff's complaint where Plaintiff had conceded that Detroit Edison owed Plaintiff no duty. Further, with regard to the one issue to which

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Plaintiff continued to adhere (i.e., whether it was reasonably foreseeable that injury would occur from an energized, downed power line such that Detroit Edison had a duty to Plaintiff to immediately safeguard him from such an eventuality), Detroit Edison observed that the recloser in this case operated properly and as intended, and had de-energized the line within six (6) seconds. That is, while Plaintiff characterized the normal operation of Detroit Edison's reclosers as a "re-energizing" of the electric lines (which he says constituted negligence), that is just another way of alleging that Detroit Edison had a duty to de-energize its lines, despite its not having any actual knowledge of, or basis to reasonably foresee, Plaintiff's interaction with the line in question. (APX, pp 15b-23b.)

Indeed, Detroit Edison explained that reclosers are used industry-wide on open primary circuits (like the circuit in this case) because they safely prevent approximately eighty percent (80%) of all power outages. Although Detroit Edison had no duty to de-energize this line at all, the recloser in this case de-energized the circuit within six (6) seconds of the wire being severed, and during that six (6) seconds, the wire was only "live" for a about one and one-half (1 ½) seconds. (APX, pp 94a, 24b.)[4]

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[4] Most faults on open primary circuits are temporary in nature, i.e., they will clear themselves within a matter of seconds. Reclosers were designed to allow temporary faults to clear themselves without shutting down the whole circuit until a line crew locates the source of the fault (which very likely might no longer exist). When a recloser senses a fault, it opens up, temporarily interrupting power to allow the fault to clear. It then re-closes for less than one-half (½) second to determine whether the fault is gone. If the fault is no longer present, the power remains on. However, if the fault is still present, the

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At a March 6, 2000 hearing on Detroit Edison's motion for summary disposition, Detroit Edison argued in general accord with its written submissions (APX, pp 121a-132a). In response, Plaintiff conceded that Detroit Edison had no duty to de-energize its lines in order to protect Plaintiff upon his coming into contact with them (APX pp 132a-134a). Nonetheless, Plaintiff paradoxically argued that a duty arose the instant that Detroit Edison's power line was severed and it struck the ground (APX p 134a). Essentially, Plaintiff argued that Detroit Edison had a duty not to de-energize its lines by virtue of the use of reclosers. (APX, pp 132a-134a.)

Judge Holowka agreed with attorney Malcolm Harris' position. After making an effort to distinguish the Groncki-Bohnert-Parcher trilogy from the instant case by noting that Plaintiff was not the operator of the equipment that came into contact with the power lines. Judge Holowka, refusing to follow the precedent of the Groncki trilogy, ruled as follows:

". . .the question becomes whether Detroit Edison

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recloser cycles through again to allow the fault to clear. If, after the third operation, the fault is still present, the recloser locks open, cutting off power. As noted above, this entire process occurs in less than six (6) seconds, and the electricity flows for less than one and one-half (1.5) seconds. Plaintiff's expert claims that the recloser aggravated Plaintiff's injuries because he received multiple shocks instead of just one. (APX, pp 94a-96a.) Notably, however, Plaintiff's expert is comparing de-energization through the use of a recloser with the theoretical effects that Plaintiff would have suffered had the line been de-energized by virtue of a "fused cutout". Inasmuch as Detroit Edison had no duty to de-energize the lines at issue in anticipation of an unforeseeable Plaintiff, a proper comparison would have involved the injuries that Plaintiff suffered before the recloser de-energized the broken line and those injuries that Plaintiff likely would have suffered had the broken line remained energized until Detroit Edison had an actual reason to know of Plaintiff's peril and could have sent a line crew to the scene.

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could have reasonably perceived that a person who comes into contact with a downed wire would suffer increased harm from the line's re-energization.

In this Court's mind the answer to that question is most assuredly, yes. In reaching this conclusion, the Court is mindful of the fact that under the Schultz, Groncki test the Court was apparently required to make some kind of determination as to whether the plaintiff himself was engaged in a reasonable activity or not.

However, in the eyes of this Court, the jury's judgment as to whether the plaintiff's conduct was reasonable is a much more accurate measure of what this community standards are. And again, citing Moning v Alfono.

The Court further agrees with the dissent that Justice Levin filed in the Groncki case. That by using the words reasonable activity the Groncki test has impermissibly defined the utility's duty to the public to include a calculus of the fault of the injured person. It holds, in effect, that Detroit Edison has no duty to persons who are comparatively negligent.

For reasons which the court has indicated, motion for summary disposition is considered and denied." [APX, pp 144a-145a (emphasis supplied).]

A written order giving effect to that bench ruling was entered on March 17, 2000 (APX 148a-149a).

On March 30, 2000, Detroit Edison moved for reconsideration of the Trial Court's Order denying its motion for summary disposition, noting that the Trial Court had misconstrued the Groncki rationale as a comparative negligence analysis when, in fact, the Groncki opinions dealt with the threshold issue of foreseeability as it relates to the initial element of duty. In addition, Detroit Edison noted that it was not logical for the Court to hold that, while the accident causing the downed power line was unforeseeable, it was nonetheless foreseeable that a person would be injured by the unforeseeably downed wire. (APX, pp 151a-167a.)

On April 10, 2000, the Trial Court issued a bench ruling denying Detroit Edison's motion for summary disposition (APX, pp

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171a-180a). The ruling contended that Groncki did not apply because Plaintiff was not the operator of the trailer and because Detroit Edison "made a conscious decision to install the recloser devices." (APX, pp 172a-173a, 178a-179a.)[5] On May 8, 2000, the Trial Court entered a conforming written order (APX, pp 182a-183a).

On May 26, 2000, Detroit Edison filed a timely application for leave to appeal on an interlocutory basis from the Trial Court's denial of its motion for summary disposition. On September 11, 2000, the Court of Appeals granted leave. (APX, p 184a.)

The Judgment of the Court of Appeals

In its November 6, 2000 Brief on Appeal to the Court of Appeals, Detroit Edison argued that: (1) under well-established Michigan precedent, Detroit Edison owed no duty to Plaintiff because the accident was not reasonably foreseeable as a matter of law; (2) the Trial Court had erred by misconstruing the Groncki-Bohnert-Parcher trilogy, negating the precedent as a comparative negligence analysis when the trio of cases clearly dealt with the issue of foreseeability as it relates to duty; (3) the Trial

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[5] In contemplating the Trial Court's reasoning, one is left with the impression that the Trial Court somehow believed that the act of severing the wire somehow cut off the power to the downed line and that the recloser device then functioned to return electrical current to the downed wire. In reality, and as admitted by Plaintiff's expert, the recloser **was** the device that cut off power to the line. (APX, pp 94a-95a.) While Plaintiff's expert is correct that such protective devices as reclosers are intended to protect the electrical system by sectionalizing it to prevent total a system failure when a ground fault (such as happened here) occurs, there is no logic to the suggestion that had Detroit Edison not acted to protect its system with reclosers (i.e., if Detroit Edison simply allowed current to flow through ground faults until the entire system failed) that Plaintiff (who would have experienced a shock of much greater duration) would have been better off.

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Court's characterization of Plaintiff as an innocent bystander was clearly erroneous; and (4) by denying summary disposition to Detroit Edison on the basis that it had de-energized the line in question by use of an automatic recloser (when it had no duty to de-energize the line at all in the first place in order to protect an unforeseeable Plaintiff) the trial court erroneously created and imposed a new and impossible duty on electric utilities.

On or about February 20, 2001, Plaintiff filed a response brief in the Court of Appeals that largely mirrors its present Brief on Appeal to this Court, including the arguments never made to the Trial Court that: (1) Groncki and its companion cases do not constitute binding authority;[6] and (2) that Detroit Edison had voluntarily assumed a duty to safeguard Plaintiff from the consequences of the events that resulted in his injury.

On February 19, 2002, the Court of Appeals rendered the judgment currently under review in a succinct opinion recognizing that it was bound by this Court's previous decisions on these nearly identical facts. In doing so, the Court of Appeals began with an indisputably accurate summary of the factual and procedural history of the instant case, stating:

> "Plaintiff Steve Valcaniant was injured by a downed electrical line. He was directing a driver who was delivering a load of fill dirt. The driver backed the truck under an electric wire, of which both he and Plaintiff were aware. When the truck bed rose, it came into contact with the wire, which fell into a puddle near

[6] Although Plaintiff argued to the Trial Court that Groncki was not a "sweeping" decision (APX, p 9b), it was not until Mr. Harris filed his brief on appeal to the Court of Appeals that he argued that Judge Holowka correctly refused to follow this Court's decision in Groncki as it was not binding authority.

> plaintiff. Plaintiff received an electrical shock, causing burns to his arm and back. Defendant moved for summary disposition, asserting that it owed no duty to plaintiff because his injury was unforeseeable. The trial court found that it was foreseeable that the public would be injured by downed power lines and thus defendant owed plaintiff a duty." [APX, p 185a.]

The Court of Appeals then cited the consolidated cases of Groncki v Detroit Edison, 453 Mich 644, 557 NW2d 289 (1996), Parcher v Detroit Edison, 453 Mich 644, 557 NW2d 289 (1996) and Bohnert v Detroit Edison, 453 Mich 644, 557 NW2d 289 (1996) for the following well-established principles of law: (1) there is no duty to warn someone of a danger of which he or she is already aware; (2) an electric utility has no duty to warn members of the public regarding the presence or danger from known overhead power lines; and (3) because of the important social benefit of providing electric power at a reasonable cost, an electric utility does not have a duty to anticipate (i.e., it is not reasonably foreseeable) that (where overhead wires are not defective and the utility does not have a particular reason to know that persons will be operating machinery near its lines) experienced individuals would disregard the known danger and contact with its lines. (APX, p 186a.)

Detroit Edison's response to Plaintiff's appeal from this judgment now follows.

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ARGUMENT I

THE COURT OF APPEALS DID NOT CLEARLY ERR WHEN IT DETERMINED THAT THIS CASE WAS CONTROLLED BY THE PRINCIPLES ANNOUNCED BY THIS COURT IN GRONCKI, BOHNERT AND PARCHER AND THAT THOSE PRINCIPLES ENTITLED DETROIT EDISON TO SUMMARY DISPOSITION IN ITS FAVOR.

Defendant Detroit Edison salutes the Supreme Court by its grant of leave in this case so that Bench and Bar will be made aware that plainly enunciated legal principles must be followed, not avoided, by idiosyncratic local preferences which amount to Judicial Nullification of stare decisis-driven precedent.

In accordance with the well-settled principles set forth in Groncki v Detroit Edison, 453 Mich 644, 557 NW2d 289 (1996) (including the companion cases of Bohnert v Detroit Edison and Parcher v Detroit Edison), and under the undisputed facts of this case, Detroit Edison had utterly no duty to anticipate that the high-reaching equipment being operated under Plaintiff's direction might come into contact with the lines in question. Consequently, Detroit Edison had no duty to move, de-energize, better insulate, or warn Plaintiff about the danger posed by the overhead power line in question. Further, and contrary to Plaintiff's unwarranted assertion, the legal principles and the central holding of the Groncki-Bohnert-Parcher trilogy were supported by at least a five-Justice majority and, a priori, the cases constitute binding precedent. Moreover, there is no principled justification for this Court to not apply, or depart from, these firmly-established and well-reasoned enclaves of judicial legal policy. More specifically, there is no logic to Plaintiff's strained theory that, even though Detroit Edison had no legal duty to de-energize

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its lines at all in order to protect Plaintiff from the harm he experienced, Detroit Edison nevertheless had a duty not to use an automated recloser device to de-energize the line[7]. Accordingly, the Court of Appeals did not clearly err when it found that the trial court should have granted summary disposition.

ISSUE PRESERVATION

It is undisputed that it was Plaintiff who was directing the positioning of the dump truck under the wires at the time of his accident, and that he knew that he had to avoid the electrical wires because of the danger they posed. Further, Plaintiff knew that water is a good conductor of electricity and that the area where he was working was wet. Moreover, since he owned the property since 1974, Plaintiff conceded that the presence of these wires had been known to him for years. (APX, pp 62a-63a, 66a, 77a-78a.) It is also undisputed that the wires at issue were nearly 26 feet off the ground, running along the back property line, and nowhere near any building or structure. (APX, pp 93a, 4b-5b.)

The question whether, under these undisputed circumstances, Plaintiff's claims are controlled by the principles announced by this Court in Groncki, Bohnert and Parcher was initially raised by Detroit Edison in its motion for summary disposition. These defenses were addressed by the Trial Court in its bench ruling and conforming order rejecting this Court's precedent. (APX, pp 100a-

[7] In August, 2003, the catastrophic loss to the United States of our electrical power grid reinforces the wisdom, safety and validity of universally used recloser systems to minimize system-wide power outages. Does Plaintiff seriously advance the view that his refusal to accept personal responsibility can be excused by tort liability which challenges the safety of recloser systems?

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120a, 137a-149a.) This issue was again raised in Detroit Edison's motion for rehearing, and addressed by the Trial Court in a subsequent bench ruling and conforming order. (APX, pp 151a-183a.) Finally, this issue was also raised by Detroit Edison in its application for leave and Brief on Appeal to the Court of Appeals, and addressed by that Court in its February 19, 2002 opinion (APX, pp 185a-186a). Consequently, this issue is generally preserved.

However, Plaintiff's sub-argument [that Groncki is a non-binding plurality opinion (an erroneous proposition to be generous, to say the least, see infra)] was raised for the first time on appeal, and is, therefore, not properly preserved and is subject to forfeiture. See Booth v University of Michigan Bd of Regents, 444 Mich 211, 233, fn 23, 507 NW2d 422 (1993) (the Michigan Supreme Court has repeatedly declined to consider legal arguments, even those involving constitutional claims, that are raised for the first time on appeal). Indeed, Plaintiff specifically acknowledged before Judge Holowka that the precedential effect of the Groncki trilogy required the instant case to be distinguished from Groncki in order to avoid summary disposition (APX, pp 132a-134a). Consequently, Plaintiff's argument in this regard is not only unpreserved, it has been affirmatively waived. See Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health, 207 Mich App 482, 484, 525 NW2d 466 (1995) ("[a] party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court"). See also People v Carter, 462 Mich 206, 214-217, 612 NW2d 144 (2000) (discussing

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difference between waiver and forfeiture and noting that "waiver may be effected by action of counsel").

STANDARD OF REVIEW

This Court, like the Court of Appeals before it, owes no deference to the trial court's decision on a motion for summary disposition, but instead engages in de novo review. Stone v Michigan, 467 Mich 288, 291, 651 NW2d 64 (2002); Spiek v Dep't of Transportation, 456 Mich 331, 337, 572 NW2d 201 (1998); Auto Club Ins Ass v Sarate, 236 Mich App 432, 434, 600 NW2d 695 (1999). Moreover, the question of "[w]hether a defendant owes a plaintiff a duty of care is a question of law for the court." Beaudrie v Henderson, 465 Mich 124, 130, 631 NW2d 308 (2001). This Court also reviews questions of law de novo. Rogers v J B Hunt Transport, Inc, 466 Mich 645, 650, 649 NW2d 23 (2002). Nonetheless, it is within this Court's discretion to defer to the resolution of this issue by the Court of Appeals to the extent that the Court of Appeals decision is not both clearly erroneous and certain to cause material injustice. MCR 7.302(B)(5).

LEGAL DISCUSSION

It is absolutely essential to get crystal clear what this case is **NOT** about. Plaintiff does **NOT** claim that the accident was reasonably foreseeable, only that, once the downed power line was on the ground, that Detroit Edison should have immediately de-energized the severed line. (APX, pp 132a-134a, 11b; Plaintiff's Brief on Appeal, pp 7-8, 26). Any claims of a duty to warn of overhead lines, or a duty to move lines during the landscaping or a duty to warn of obvious danger of coming into contact with the

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lines or any duty to raise the lines were **specifically** abandoned by Plaintiff (Id.). What is **ONLY** at issue is Plaintiff's liability claim for alleged negligence in keeping a downed line energized, albeit for a very brief time, by use of reclosers.

"To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation [including both cause-in-fact and proximate cause], and (4) damages." Case v Consumers Power Co, 463 Mich 1, 6, 615 NW2d 17 (2000). Normally, whether a duty has been breached involves a determination of whether a general duty of care includes an identified specific duty of care. Id. at 7. The general duty of care in negligence cases "is always the same-to conform to the legal standard of reasonable conduct in light of the apparent risk." Schultz v Consumers Power Company, 443 Mich 445, 450, 506 NW2d 175 (1993), quoting Prosser & Keeton, Torts (5th Ed), § 53, p 356. Although juries generally determine whether a specific duty of care[8] is required in order to conform to a general duty of care (using a test that asks "whether the magnitude of the risk is outweighed by its utility"), these questions are often removed from jury consideration as questions of law where it is determined that paramount concerns regarding social utility and consistency require that a particular view be adopted

[8] A specific standard of conduct with regard to, for instance, the driver of an automobile, "may be expressed as saying that the driver . . . approaching an intersection is under a duty to moderate his speed, to keep a proper lookout, or to blow his horn, but that he is not under a duty to take precautions against the unexpected explosion of a manhole cover in the street." Moning v Alfono, 400 Mich 425, 437, 254 NW2d 759 (1977), quoting Prosser, Torts (4th ed.), § 53, p 324 (internal quotation marks omitted).

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and consistently applied in all cases. Moning v Alfono, 400 Mich 425, 438, 450, 254 NW2d 759 (1977). As the previously cited commentators put it:

> "Thus, the court may rule that it is necessarily negligent to drive across a railroad track without stopping to look and listen, to cross the street without looking, or to walk into the side of a passing automobile, to drive at such a speed that it is impossible to stop within the range of vision, or to ride with a driver that is known to be drunk; or that it is not negligent to fail to take precautions which no reasonable person would consider necessary under the circumstances." [Prosser & Keeton, Torts (5th Ed), § 37, pp 237-238 (footnote citations omitted).]

A. It Is Well-Settled In Michigan That An Electric Utility Has No Duty, As A Matter Of Law, To Anticipate That Workers Will Use High-Reaching Equipment To Come Into Contact With Overhead Power Lines Known To Be Dangerous.

In Michigan, there are currently two important instances where, pursuant to this Court's plainly-worded precedent, it has been determined that paramount concerns regarding social utility and consistency require that a particular view of the duty owed to members of the public by electric utilities be adopted and consistently applied in all cases.

These situations involve considerations regarding both the inherent danger of supplying electricity to the public and the indisputable social benefit of ready access by the public to electricity at a reasonable cost. These scenarios may be viewed as "exceptions" (and will be referred to as such herein) to the general rule that the trier-of-fact determines whether specific conduct meets the requirements of the general standard of conduct, but in reality, they are just a consistent application of the rule

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stated in Moning, supra at 438, 450.[9]

The first of these "exceptions" comes from Schultz, supra, where this Court held that, as a matter of law, "those engaged in transmitting electricity are bound to anticipate ordinary use of the area surrounding the lines and to safeguard against the attendant risks," Schultz, supra at 452 and "not only [do] electric utility companies owe [the public] a duty to exercise reasonable care in maintaining their wires, but that those companies are required to 'reasonably inspect and repair wires and other instrumentalities in order to remedy hazards and defects.'" Case, supra at 7-8, quoting Schultz, supra at 451. The necessity of consistently applying this more specific duty of care[10] was

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[9] It is far from unusual for this Court to identify a specific type of situation where, for reasons of overriding public concern, it is determined as a matter of law that no duty of care arises (i.e., that there is no duty to anticipate or take steps to prevent a certain type of "theoretically" foreseeable harm). For instance, in Schultz, this Court determined a more specific version of the general standard of care owed by an electric utility after considering the more specific version of the general standard of care owed by a landlord (i.e., "a landlord must inspect a premises to keep it in reasonably safe condition." Schultz, supra at 450-451 (citations omitted). However, it is beyond dispute that this duty of care owed by landowners does not include the duty to anticipate trespassers or to take steps to safeguard the premises for a trespasser's arrival. See Stitt v Holland Abundant Life, 462 Mich 591, 596, 614 NW2d 88 (2000) ("[t]he landowner owes no duty to the trespasser except to refrain from injuring him by 'wilful and wanton' conduct"). Consider also, Robinson v City of Detroit, 462 Mich 439, 450-453, 613 NW2d 307 (2000), where this Court held that, although police officers have "the duty to drive with due regard for the safety of persons using the highway," for reasons of public policy, police officers owe no duty to fleeing suspects to refrain from chasing the suspect at speeds dangerous to the suspect, nor do they owe a duty to culpable passengers in the fleeing vehicle.

[10] In Case, this Court characterized the Schultz decision as deciding the specific standard of care owed by an electric utility. 463 Mich 8, fn 8. While true to some extent, this more specific standard of care still operates as a general standard of conduct with regard to whether some certain identified conduct meets with its requirement for what is reasonable. Hence, it may be more

predicated on the dangers associated with **unintended** contact with high-voltage electricity. Case, supra at 8; Schultz, supra at 451.

The second "exception," being the set of principles at issue in the instant case, may be viewed as a corollary to the first, and is currently set forth in the 1996 Groncki-Bohnert-Parcher trilogy of cases. However, this second "exception" is actually one of substantial veneration that is considerably more entrenched in Michigan jurisprudence than the rule from Schultz. See, e.g., Koehler v Detroit Edison Co, 383 Mich 224, 174 NW2d 827 (1970);[11] Dees v L F Largess Co, 1 Mich App 421, 136 NW2d 715 (1965);[12]

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accurate to think of it merely as a "more specific" application of the general standard of conduct.

[11] In Koehler, the decedent hired a crane operator to assist with a building he was constructing. The crane, with a sixty foot (60') boom, was situated about fifteen feet (15') west from the building. A thirty-five foot (35') high electrical line was located about fifty feet (50') west of the building. The decedent instructed the crane operator to use his boom to, among other things, give the decedent a lift up to the top of the building and back down as needed. The decedent was killed when the crane operator swung him too close to the power lines. The decedent and the crane operator were aware of the lines and the danger posed by them. This Court held that "[t]he mere fact that Detroit Edison knew a building was under construction near its power line and that, from time to time, mobile cranes were being brought upon the premises to be used in construction work, would not, standing alone, create a duty upon Detroit Edison to remove the charge, insulate the line, or notify the parties of the dangerous condition." 383 Mich 231.

[12] In Dees, a fifty-five foot (55') crane was being used to lift joists when its cable came into contact with Detroit Edison power lines, which were approximately thirty-seven feet (37') in the air. When the crane's cable touched the lines, an electric current was transmitted down the cable to the trailer that the plaintiff was leaning against, severely injuring him. The Court of Appeals upheld the trial court's directed verdict for Detroit Edison, observing that: (1) Detroit Edison had a right to maintain transmission lines in the area of the construction; (2) the wires were insulated within the meaning of the public service act by 35 feet of air space from any foreseeable contact; and (3) "[t]he law does not require those maintaining power transmission lines to anticipate every possible fortuitous circumstance that might cause

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Williams v Detroit Edison Co, 63 Mich App 559, 234 NW2d 702 (1975);[13] Signs v Detroit Edison Co, 93 Mich App 626, 649, 287 NW2d 292 (1979);[14] Ransford v Detroit Edison Co, 124 Mich App 537, 335 NW2d 211 (1983).[15] It can be stated with confidence that the line of cases which emphatically refuses to extend liability for knowledgeable workers coming into contact with "air insulated" wires form a better template than Schultz's rule of foreseeability for wires by which the public may **unintentionally** come into contact. The Supreme Court should declare this border on Schultz

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injurious contacts with those power lines." 1 Mich App 427.

[13] In Williams, a backhoe operator severed an overhead power line with his machine's boom. When the line fell, it struck the decedent and electrocuted him. The jury returned a "no cause" verdict for Detroit Edison and, on appeal, the Court of Appeals affirmed, holding that the trial court had not erred by instructing the jury that if the construction workers knew of the power lines and knew of the dangers presented by them, and could have requested that Detroit Edison de-energize the lines if they felt it was necessary but did not, then Detroit Edison had no duty to de-energize the line or warn the crew of the dangers presented by the line. 63 Mich App 573.

[14] In Signs, the decedent was holding onto a pipe that was being lifted by a 37 ½ foot crane operated by one of the decedent's co-workers. The crane came in contact with high voltage lines that were 29 feet above the ground, and the decedent was electrocuted. With regard to the claim against Detroit Edison, the trial court directed a verdict in its favor finding "insufficient evidence to establish a duty or a breach of duty." The Court of Appeals affirmed, holding that "nothing in the design or placement of the wires suggested that contact of the wires by a crane could be anticipated." 93 Mich App 649.

[15] In Ransford, the decedent was demonstrating a wire-controlled model airplane at a private park that was bounded on one side by overhead power lines. The lines were thirty-three feet (33') above the ground and carried 4800 volts of electricity. Although the decedent was an expert model airplane pilot and knew he needed to avoid the power lines, he nonetheless flew his model airplane close to the lines, where it became entangled, resulting in his electrocution. The Court of Appeals upheld a directed verdict for Detroit Edison, agreeing that, as a matter of law, "Detroit Edison breached no duty owed to plaintiff's decedent." 124 Mich App 546.

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with equal emphasis as this granted application gives this Court that chance to do so. Schultz should be limited to its facts of a frayed wire doing great damage. Here, Plaintiff, through his own actions, severed and brought down a live wire which was safely in the sky. Plaintiff knew about the wire, knew the danger, knew which precautions to take. Schultz was correctly decided but so was the Groncki trilogy. Schultz should be limited.

The essence of the principles that comprise this second "exception" is that when overhead wires **are** in reasonable repair, and skilled workers who come into their proximity are (by virtue of their experience) aware of the presence of the overhead wires and the danger posed therefrom, and the utility company has no particular reason to suspect that those workers will come into contact or dangerously close proximity to the lines, then the electric utility has no duty to de-energize, better insulate, warn, or otherwise safeguard those individuals from the danger posed by coming into contact with the lines. This is so because such a risk of harm is not reasonably foreseeable to the electric utility as a matter of law. A review of the Groncki-Bohnert-Parcher trilogy which hones this rule even further now follows.

Let us start with Groncki. While on the roof of a condominium building, workers unsafely used a twenty-four foot (24') metal ladder in their construction job. Gerald Groncki was a maintenance supervisor at the condominium complex and was injured when the ladder that he personally was moving came into contact with an unsheathed overhead electrical line. Groncki went into cardiac

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arrest and suffered severe burns on his left foot. As with the instant case, Mr. Groncki himself (as did Mr. Valcaniant) had warned other workers about the dangers of working near the power lines and knew the danger of his coming into contact with electricity. When another employee left to work in a different area, Mr. Groncki imprudently attempted to move the metal ladder by himself, lost control of the ladder which then fell into the power lines. The power lines were twenty-one feet (21') high and fourteen and one-half feet (14.5') from the building. The summary disposition in Groncki obtained by Detroit Edison in the Circuit Court was reversed by the Court of Appeals, which decision was, itself, reversed by this Court. It will be recalled that the plaintiff in Groncki moved the equipment himself. Since the Trial Court felt that this was a great distinction - - one which allowed Judge Holowka to avoid precedent - - perhaps the Court should be reminded that Mr. Valcaniant directed the dump truck into the wires himself, by his own actions.

In Bohnert v Detroit Edison Co, a delivery man for National Cement Products, was delivering a load of concrete blocks that had been ordered by a general contractor, Carrington. Because no one was at the site when the truck driver arrived, Mr. Bohnert began to unload his truck, unsupervised. Despite specific warnings on the truck, Mr. Bohnert deployed the boom of his truck underneath power lines and, unfortunately, lifted the boom in such as way as to touch the lines. Mr. Bohnert was immediately killed. As in the case at bar, the lines were located at a significant distance from

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the building and were at the substantial height of twenty-six feet (26'). The power lines were not covered with dielectric sheathing[16] and Detroit Edison declined to further insulate or move the power lines except for a fee.

As here, the plaintiff contended that Detroit Edison had a duty to de-energize the wire once it fell. All Justices, except Justice Levin, agreed that Detroit Edison had utterly no duty to insulate, move or otherwise de-energize the wire, which of course, did not become a danger until a workman touched the wires with equipment extending twenty-six feet (26') into the air. This Court held that, because there was no duty, no liability could be placed on Detroit Edison for alleged negligence.

In Parcher v Detroit Edison Co, a forklift operator received a severe shock while moving a twenty-nine foot (29') high scaffold with his forklift during the construction of a supermarket. The power lines were sixty-five feet (65') from the building and thirty-five feet (35') above the ground. Although Detroit Edison knew of the ongoing construction and had moved some of the lines to accommodate the construction, some of the power lines, which had been there for a number of years, were not moved. Mr. Parcher knew about the existence of these lines and of the danger in having equipment touch them. Again, this Court found that there was no duty, and thus no liability, attributable to Detroit Edison with

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[16] Sometimes, such lines are incorrectly referred to as being "uninsulated." However, calling these types of lines "uninsulated" is a wildly inaccurate misnomer. They are 25-60 feet in the air and are "air insulated" by distance between themselves and any other path of conduction.

regard to the harm suffered by Mr. Parcher.

Hence, under Groncki, Bohnert and Parcher, read together, while utilities, under certain circumstances, are charged with a duty to protect against foreseeable harm, it is not reasonably foreseeable as a matter of law for utilities like Detroit Edison to anticipate that persons, fully aware of the danger, will decide nevertheless to engage in construction work that brings them into contact with electrical wires by use of high-reaching equipment.[17] That is, given the safe placement of non-defective wires by utilities (i.e, wires which are twenty (20), thirty (30) or forty (40) feet into the sky and which can only be touched with extreme difficulty), the social benefits of electricity are too great, and the danger from overhead power lines is too well-known by persons familiar with construction who operate equipment capable of reaching them, to expect that an electric utility should anticipate carelessness that does not present reasonably foreseeable safety hazards for the sensate, let alone the reasonably prudent.

Against this backdrop of the applicable law, the following examination of Plaintiff's arguments on appeal reveals that they are all bereft of merit.

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[17] Indeed, a duty to anticipate such conduct would impose a duty on electric utilities to presume that workers, such as Mr. Stander in this case, will knowingly violate Michigan regulations that provide safety related work practices for persons whose work brings them into proximity with energized wires. See R 408.14001 et seq.

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B. Plaintiff Incorrectly Asserts That The Groncki-Bohnert-Parcher Trilogy Lacks Precedential Value.

To the extent that Judge Holowka's fierce individualism demonstrates how Groncki, Parcher and Bohnert can be misread and ignored as clearly stated precedent, the Supreme Court's propitious grant of leave here affords the Court a not-to-be-missed chance of advising Bench and Bar of the strength of the law announced in those cases.

Plaintiff attempts to exploit the very thin ideological divisions made among the Justices in Groncki, Bohnert and Parcher in order to claim that the principles set forth in the entire Groncki trilogy did not receive the endorsement of a majority of Justices (Plaintiff's Brief on Appeal, pp 15-20 and APX 187a). Therefore, the argument goes, Groncki and its companion cases state no legal precedent.

For the reasons which will be shown below, this is clearly not correct, indeed, it is more than a trifle disingenuous because the refusal of our Supreme Court, as a matter of law, to recognize any liability or the duty on the utilities to "relocate, insulate, de-energize, warn, and erect safety barriers around power lines" was made applicable as binding precedent in all three cases, Groncki, Bohnert and Parcher, the central holding of which received a solid majority of all Justices participating. 453 Mich 661-662.

Justice Brickley's lead opinion is structured as follows: Parts I(A), I(B), and (I)(C) set forth the facts in each of the three consolidated cases. 453 Mich 650-654. Part II(A) sets forth

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a statement of the law that applied in those cases (and presently applies in the instant case) as gathered from Michigan precedent. 453 Mich 654-657. Parts II(B)(1), II(B)(2), and II(B)(3) detailed the Court's application of the law to the facts in each of the three cases. Part II(C) set forth the important considerations of public policy (see infra) regarding "the public's need for electric power at a reasonable cost." 453 Mich 661-662. Part III set forth Justice Brickley's analysis and resolution of an issue in Bohnert unrelated to the principles at issue in the instant case (i.e., it concerned the liability of a general contractor to provide a safe working environment for the employees of subcontractors). 453 Mich 662-665. Finally, Justice Brickley provided a conclusion that set forth the resulting effect on each of the three cases (affirm in Parcher, reverse in Groncki and affirm in part and reverse in part in Bohnert) from following his lead opinion (which, of course, is what occurred in each of those cases). 453 Mich 665.

Justice Boyle concurred in the result only. 453 Mich 665.

Justice Mallet, joined by Justice Cavanagh, expressly concurred in Justice Brickley's assessment and result in both Parcher and Bohnert, and even went so far as to expressly adhere to the same central authority relied on by Justice Brickley, namely, Koehler, supra, 383 Mich 224. Indeed, Justice Mallet found these cases similar enough to refer to them as "[t]he Koehler-Bohnert-Parcher trilogy." The only disagreement that Justice Mallet had with the lead opinion was the application of these principles to the facts of Groncki. In other words, Justices Mallett and

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Cavanagh disagreed only with Part II(B)(2) of the lead opinion, as well as part of the conclusion. Moreover, the substance of the disagreement was the fact that the overhead wire in the Groncki case itself was only 14' 6" from the condominium building where Mr. Groncki was working. As Justices Mallet and Cavanagh saw it, there remained a question of fact as to whether, in placing the line, Detroit Edison had placed too "low" a line and had allowed insufficient operating room to perform reasonably necessary work on the building. 453 Mich 665-674. Notably, however, that distinguishing feature is not present in the instant case, where the line at issue was running along the property line at the back of Plaintiff's four-acre lot and not in close proximity to any structure. (A "low" line liability claim has been abandoned here). (APX, p 11b).

Justice Riley, although dissenting from the presently inapposite Part III of Justice Brickley's lead opinion, concurred with, and expressly joined in all of Part II of that opinion (i.e., the part that articulated the principles at issue in the instant case), stating:

> "I agree with the lead opinion that defendant Detroit Edison did not have a duty as a matter of law to any of the three plaintiffs because it could not have reasonably foreseen that someone would be injured in the particular circumstances of each case. Therefore, **I join in part II of the opinion**. . . . ." [453 Mich 674 (emphasis supplied).]

Inasmuch as Justice Riley expressly joined in Part II of the lead opinion, it is quite disingenuous for Plaintiff to now assert that "Justice Riley never affirmatively stated agreement with

Justice Brickley's rationale authored in part II of the Groncki decision." (Plaintiffs' Brief on Appeal, p 18.)

Justice Weaver expressly agreed with Justice Riley's partial concurrence and partial dissent, meaning that she too expressly joined in Part II of Justice Brickley's lead opinion but disagreed with the presently irrelevant Part III. 453 Mich 678.

Although Justice Levin dissented from the lead opinion, 453 Mich 679-684, and even accepting arguendo Plaintiff's assertion that Justice Boyle's concurrence "in the result only" counts for nothing,[18] there is still, by irrefutable head-count, a five-Justice majority for all of the principles of law set forth in Part II of the lead opinion and for all of the applications of law to the facts regarding situations where, as in the instant case, the electrical lines in question are not located in close proximity to a house or building. Five Justices expressly adhered to the principles of Koehler, supra, which, like Bohnert and Parcher, are indistinguishable from the instant case with regard to whether Detroit Edison owed Plaintiff a duty to anticipate that someone would come into contact with the line in question.

Moreover, this same, solid five-Justice majority (Brickley, Mallett, Cavanagh, Riley and Weaver, JJ.) endorsed the portion of Groncki, Bohnert and Parcher relating to public interest

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[18] Assuming arguendo that Justice Boyle's "concurring in the result" somehow left the Groncki application-of-the-law-to- the-facts portion of the decision [i.e., Part II(B)(2)] a plurality opinion, that particular application of the law can still prevail as a persuasive legal authority which can be followed by any court that chooses to adhere to its dictates. Knudsen v Klevering, 377 Mich 666, 141 NW2d 120 (1966)(Black, J.).

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considerations, an indisputably clear feature of the trilogy, which Plaintiff simply ignores. This holding by an absolute, positive majority of this Court, found at 453 Mich 661-662, provides:

> "The social policy at issue is the public's need for electrical power at a reasonable cost. To impose a duty to relocate, insulate or **de-energize** power lines whenever third parties construct buildings near power lines would interfere with this policy. The cost of insulating or moving these lines would be significant. Edison alone has over 35,000 miles of power lines in this State. To impose the duty the Plaintiffs request would certainly amount to a huge cost that would be passed on to the consuming public. Further, it may often be impossible for Edison or other power companies to move power lines away from new construction without moving them closer to pre-existing structures. In any event, the costs or injuries such as those suffered by these plaintiffs will have to be met in another societal forum." (Emphasis Supplied)

This holding was certainly **not** limited to Groncki, alone; it was also part of the Court's global (and parallel) holding in the Bohnert and Parcher cases. Accordingly, Plaintiff's desperate attempt to convince this Court that the Groncki-Bohnert-Parcher trilogy, together with the underlying decision in Koehler are not the law that applies to this case is wholly without merit.

C. Neither Plaintiff Nor The Trial Court Set Forth Any Valid Basis for Why the Principles From the Groncki-Bohnert-Parcher Trilogy Would Not Entitle Detroit Edison to Summary Disposition in this Case.

Between Plaintiff and the Trial Court, a number of dubious reasons have been posited for distinguishing the instant case from the principles articulated in the controlling Groncki-Bohnert-Parcher trilogy. These arguments include: (1) that even if contact with an intact power line is unforeseeable as a matter of law, it is nevertheless reasonably foreseeable that persons would come into

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contact with unforeseeably downed power lines and a jury should decide whether it was reasonable for Detroit Edison to use reclosers that "re-energize" downed lines; (2) that because Plaintiff was not the driver of the dump truck in question, the Groncki-Bohnert-Parcher principles do not apply; (3) that Plaintiff was not sufficiently "sophisticated" with regard to electricity to fall within the rule from Groncki-Bohnert-Parcher; (4) that the Groncki-Bohnert-Parcher decisions have been limited by subsequent decisions whereas Schultz should be read broadly; and (5) that Justice Levin's dissent in Groncki yields a preferable result and should be followed. Further, Plaintiff simply ignores the fact that the social utility of electricity being provided to the public at a reasonable rate is a constant of nearly inestimable value and he would, obviously, prefer that juries individually re-weigh the burden of power outages in each case as it arises. Detroit Edison now responds to these erroneous positions seriatim.

First, Plaintiff attempts to negate the troublingly dispositive Groncki trilogy as precedent by contending that Detroit Edison has an obligation not to use a circuit-breaking device called a "recloser" to **de-energize** the line. Through a semantic twist, Plaintiff calls this process a **"re-energizing"** of the line. This euphemism is a verbal distinction without a difference, something to make your average Lexicographer Of Ordinary Prudence dizzy with vertigo. This is now semantics to avoid the holding of the cases, 453 Mich at 661, 662, that displaces liability for not **de-energizing** the line, no more, no less.

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Reclosers are used industry-wide on open primaries (like the circuit in this case) in overhead electrical systems because they safely prevent approximately eighty percent (80%) of all power outages. Most faults are extremely temporary in nature (arising from such occurrences as lightning, which temporarily pierces the insulating air around the lines, permitting an arc or "flashover"). Every electric customer who has experienced the lights wink out for two seconds (e.g., during a storm) and then come back on has probably experienced the benefits of a recloser. Because devices capable of sensing fault currents are not capable of distinguishing the cause (e.g., lightning, a bird, a tree branch blown by the wind, or a severed line), automated reclosers have a significant advantage over all-stop circuit-breaking devices that do not have the capability of resetting themselves; these advantages accrue to the end-users of electricity (e.g., patients in hospitals and nursing homes, passengers in elevators, air traffic controllers, drivers relying on street lights and traffic signals, etc).

When a recloser senses an "over-current" or fault situation, it temporarily interrupts the flow of electricity a few times in rapid succession and then locks open if the fault situation remains--but most faults do not remain. Massive power outages are avoided: if there is continuous contact with the line and no reclosing device, the shut down on regular circuit breaker shuts the lines down permanently and the power grid is disabled. Without reclosing devices, far more serious power outages than we routinely experience would be the norm.

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Plaintiff's conceptual model would have this Court believe that the downed line was de-energized by virtue of being severed and that the recloser worked to re-energize the line--not true. But for a protective device such as a recloser, the energized (i.e., upstream) end of the severed line would continue to possess the capability of conducting electric energy to any conductive medium with which it came into contact. Hence, when the recloser opens, it is **de-energizing** the line-briefly at first, and then, virtually instantaneously, permanently if the fault still remains.

In this particular case, even though Detroit Edison had no duty to de-energize this line at all in the first place under Michigan law, Groncki, 661-662, Plaintiff's life was actually saved by a recloser that was designed to open within 0.53 seconds of sensing a sufficient fault. The recloser then remained open for two (2) seconds, and then reclosed for 0.45 seconds to test whether the fault had cleared. In all, the reclosure completely de-energized the line within six (6) seconds and only permitted the current to flow for, at the most, a period of one and one-half (1 ½) seconds during that span. (APX, pp 94a, 24b). Hence, Plaintiff's claim that there was a duty on the part of Detroit Edison to prevent "foreseeable harm" caused by the **re-energizing** of an already downed electrical line is legal nonsense[19] -pure

[19] This Court made clear, by citing with approval Ransford, supra, 124 Mich App 537, that the concepts of foreseeability only entails those risks of danger that exist at the time that the power lines are installed, not years later when circumstances have changed. Groncki, 453 Mich 644, 655. A downed power line is clearly a changed circumstance that cannot alter what was reasonably foreseeable at an earlier time.

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sophistry, utilizing a euphemism that describes no difference. This is so because the Groncki-Bohnert-Parcher line of cases (not to mention Koehler, Dees, Williams, Signs, and Ransford) makes clear that an unforeseeably downed power line creates no tort duty--it implicates no legal obligation nor imposes any liability on the utility company, no matter how the line has been downed.

Why then should Plaintiff believe that this Court would countenance liability to be exacted from Detroit Edison for permitting a fault current to flow for 1.403 seconds during the six seconds that immediately followed the unforeseeable severing of this line by a dump truck with a high-reaching load basin being operated under Plaintiff's direction? Plaintiff cheerfully conceded to the Trial Court (APX, pp 132a-134a) that there is, generally speaking, no liability upon a public utility as a matter of law for the direct consequences of an overhead power line being contacted by experienced workers using high-reaching equipment. That issue was clearly settled by the Parcher-Bohnert-Groncki trilogy. Plaintiff's similarly fatal concession of nonliability in his present Brief on Appeal (Plaintiff's Brief on Appeal, pp 7-8, 26), therefore, renders the rest of his arguments wholly nugatory. Frankly, after these insuperable admissions, this appellate exercise has, literally, become a waste of everyone's time, to be blunt about it.

Second, the Trial Court voiced the position that the instant case is distinguishable from Groncki, Bohnert and Parcher because Plaintiff was not the operator of the trailer that struck the

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overhead power line. However, such a proposition is belied by the authority on which this Court expressly relied (and adopted) in Groncki-Bohnert-Parcher. That is, in Koehler, supra, 383 Mich 224, the decedent was not the one who was operating the crane that came into contact with an overhead electrical line but, rather, was the one who hired the crane operator and was, like Mr. Valcaniant, directing him to some extent. Likewise, in Dees, supra, 1 Mich App 421, the plaintiff was not the one controlling the crane cable that contacted an overhead power line but, instead, was merely leaning against a trailer that became energized through the crane cable. These cases were relied on by this Court in the Groncki-Bohnert-Parcher trilogy's summary of the applicable law, and these cases held that no duty arose on the part of the electric utility with regard to the incidents in question.[20]

Moreover, it is important to remember that the issue of duty is here bounded by the issue of reasonable foreseeability. There is no logic to the proposition that the foreseeability of this incident is altered by whether Plaintiff operated the truck. Logic dictates that if it was unforeseeable to Detroit Edison as a matter of law that an experienced operator such as Mr. Stander would raise

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[20] Similarly, although not expressly relied on by this Court in Groncki, Bohnert and Parcher, the Court of Appeals followed the same line of reasoning in Signs, supra, 93 Mich App 626 and Williams, supra, 63 Mich App 559. In Williams, the decedent did not operate the backhoe that severed an overhead power line but, rather, was another member of the construction crew who was electrocuted by the downed line. In Signs, the decedent was not the one who operated the crane that contacted an overhead power line but, instead, was holding onto a pipe that was being lifted by the crane. The Court of Appeals found that the incident was unforeseeable and that no duty arose on the part of Detroit Edison.

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a dump trailer to come into contact with the twenty-six foot (26') high line in question, then the risk of harm to Plaintiff from such an incident was also unforeseeable to Detroit Edison.

Furthermore, it should not be forgotten that Plaintiff was no innocent bystander or passive observer. Rather, the factual record, as patently indisputable, reveals Plaintiff as the architect and engineer of his own disaster. Recall that it was Plaintiff who specifically directed the truck driver, Charles Stander, in order that he might avoid all wires on the construction site (APX, p 63a). Further, Plaintiff knew he had to avoid the electrical wires because they are dangerous when downed, that the area in which he was working was wet, and that water is a good conductor of electricity (APX, p 66a). Finally, Plaintiff had known about these wires for many years, but stated that he did not think that they were a problem when he was directing the truck driver in the area (APX, pp 77a-78a).

Third, Plaintiff also argues that he was not "sophisticated" like the injured persons in Groncki, Bohnert and Parcher. However, that argument misreads the term "experienced workman"" as used in those cases. That is, this Court did not use the term "experienced" to describe workers who had expertise in dealing with electricity, such as electricians or line workers. Indeed, the injured persons in Groncki, Bohnert and Parcher were no more "sophisticated" in that regard than Plaintiff. Rather, this Court used the terms "experienced," and "skilled" and "familiar" to describe workers who, by virtue of their knowledge, like Steven

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Valcaniant, were aware of the presence of overhead power lines, were aware that the power lines were dangerous when contacted, and were aware that they could and should avoid the danger but nevertheless did not. This Court explained that imposing a duty on electric utilities to safeguard such experienced persons from known overhead power lines "would certainly amount to a huge cost that would be passed on to the consuming public [and hence] the costs of injuries such as those suffered by these plaintiffs will have to be met in another forum." 453 Mich 661.

Here, it is undisputed that Plaintiff was well aware of the wires and well aware of his obligation to avoid electricity, but Plaintiff decided (unforeseeably from Detroit Edison's perspective) to plunge ahead despite the risk to dump the load at a particular location--to his detriment. These facts do not distinguish the instant case from the Groncki-Bohnert-Parcher trilogy but, rather, they place this case squarely within its ambit.

Fourth, Plaintiff argues that subsequent decisions have limited the Groncki-Bohnert-Parcher decisions to their facts and that the Schultz decision is to be read broadly (see Plaintiff's Brief on Appeal, pp 23-25). This is, simply put, either a misrepresentation or a misreading of the current status of Michigan jurisprudence. In making this assertion, Plaintiff relies heavily on the vacated Court of Appeals decision in Carpenter v Consumers Power Co, 230 Mich App 547, 584 NW2d 375 (1998), vacated sub nom Case v Consumers Power Co, 463 Mich 1 (2000), which is hardly persuasive authority for his position. Indeed, in Case, this Court

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expressly held that the more specific duty of care recognized in Schultz, i.e., the affirmative obligation to "inspect and repair" represented "a very limited exception" to the general rule that juries determine whether a specific duty of care is required by the general standard of care. Moreover, this Court expressly declined to extend the affirmative obligation to inspect and repair from Schultz to stray voltage cases. 463 Mich 9-10. Similarly, in the Groncki trilogy, this Court not only declined to find that "the affirmative duty to inspect and repair imposed by Schultz includes the duties to relocate, insulate, deenergize, warn, and erect safety barriers around power lines," but explained that to do so would inappropriately expand Schultz and interfere with the public's need to obtain electric power at a reasonable cost. Groncki, supra at 661-662. Hence, it is the holding from Schultz, and not the holding from Groncki-Bohnert-Parcher, that has been sharply limited by subsequent decisions.[21] The Supreme Court should take this opportunity to so declare.

Moreover, and contrary to Plaintiff's characterization, Detroit Edison has never claimed that the principles set forth in the Groncki-Bohnert-Parcher trilogy represent "the be all and end all of utility liability" (Plaintiff's Brief on Appeal, p 23) but,

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[21] Plaintiff's heavy reliance on Schultz is, to a large extent, inexplicable. Schultz was a different case entirely than that presented here, not merely because it involved the death of a homeowner not directly involved in the construction, but, even more importantly, because the utility power line there was frayed and pitted and the defective line fell within the newly-recognized affirmative obligation to inspect and repair wires, which is in no way remotely present under these facts. Again, this grant of leave is an opportunity to limit Schultz so that it is not misused. Groncki at 655-656.

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rather, Detroit Edison recognizes that the principles governing these types of cases represent an exception to the general rule (as does Schultz) that juries will determine what specific duties are included within the general standard of conduct [see Issue I(A), supra]. Indeed, in Case this Court reiterated that such exceptions exist where "there is an overriding legislatively or judicially declared public policy." 463 Mich 7, quoting Moning, supra at 438.

Fifth, as for the idea advanced both by the Trial Court and Plaintiff that Justice Levin's dissenting opinion in Groncki Bohnert and Parcher yields a preferable result, Detroit Edison begins with a proposition that should have already been abundantly clear to both Plaintiff's counsel and the Trial Court. "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." Boyd v W G Wade Shows, 443 Mich 515, 523, 505 NW2d 544 (1993). See also Chambers v Trettco, 463 Mich 297, 309 fn 3, 614 NW2d 910 (2000).

Judge Holowka does not cover himself in glory here. Judge Holowka's act of clinging to Justice Levin's dissent in Groncki, Bohnert and Parcher (APX, pp 145a-146a) despite stare decisis was an unwarranted Judicial Nullification which could not, precedentially speaking, legitimately subvert the clear-cut holdings of the Groncki-Bohnert-Parcher Majority. Indeed, Judge Holowka's act of utilizing Justice Levin's sole **dissent** as his ratio decendae to justify refusing to follow the majority holdings in Groncki, Bohnert and Parcher is particularly inexcusable in view

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of the fact that Michigan has long held that an electric utility has no duty where it was not reasonably foreseeable that anyone like Plaintiff would do anything as overtly foolhardy as he did to come into harmful contact with those lines. Koehler, supra; Signs, supra; Dees, supra; Williams, supra; Ransford, supra.

In addition, Detroit Edison would respond to the substance of Justice Levin's Groncki dissent by first pointing out that there has long been a tension between those jurists who accept that the common-law duty element in negligence actions rests, in part, on the question of reasonable foreseeability, and those jurists who would dispense with foreseeability as it relates to duty and restrict any foreseeability inquiry to the questions of causation. As an example, compare the majority opinion of Justice (then Judge) Cardozo in Palsgraf v Long Island R Co, 248 NY 339, 162 NE 99 (1928) (finding no duty to an unforeseeable plaintiff) with the dissenting opinion of Judge Andrews in the same case (finding a duty on everyone to protect society from unnecessary danger, limited only by whether the damages are so connected with the alleged negligence that the latter may be said to be the proximate cause of the former).

Indeed, legal commentators who have considered the propensity of some judges to restrict the concept of foreseeability to issues of causation (not unlike Judge Andrews in Palsgraph and Justice Levin in Groncki) have noted the limited efficacy of such an approach, stating:

> "In [some] cases, the standard of reasonable conduct does not require the defendant to recognize the risk, or

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> to take precautions against it. The owner of an automobile who leaves it unattended in the street is, in some jurisdictions, not required to anticipate that other persons will move it; a city need not provide all its bridges with railings sufficient to keep any car from going over the edge; the owner of premises need not foresee that the wind will swing a door against a boy and put out his eye; and no one is required to anticipate a storm of unprecedented violence, or foresee that a cow will knock a man under a train. In these cases, the defendant is simply not negligent. When the courts say his conduct is not "the proximate cause" of the harm, they not only obscure the real issue, but suggest artificial distinctions of causation which have no sound basis, and can only arise to plague them in the future." [Prosser & Keeton, Torts (5th Ed), § 42, p 275 (footnote citations omitted).]

As evinced by this Court's decision in Groncki, Bohnert and Parcher, as well as the cases cited therein, Michigan has long adhered to the traditional/majority approach espoused by Justice Cardozo and the above-quoted treatise excerpt that the question of "duty" is a threshold matter that must be addressed in terms of foreseeability **before** moving on to address such matters as actual or proximate cause.[22] By contrast, in his Groncki dissent, Justice Levin made clear that he would have reserved the question of foreseeability to the issue of comparative negligence (i.e., whether and to what degree the conduct of the plaintiffs, Detroit Edison, or others comprised the proximate cause(s) of the plaintiffs' damages). Groncki at 681-682. Although Justice Levin's approach might yield the proper (i.e., same) result in a

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[22] See, e.g., Corinti v Wittkopp, 355 Mich 170, 175, 93 NW2d 906 (1959) (duty of car owner to not leave his keys in the car did not extend to person whose property was damaged when a thief used the keys to steal the car).

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great many cases,[23] if a majority of this Court adopted such an approach, it would, as warned of above, "not only obscure the real issue, but suggest artificial distinctions of causation which have no sound basis, and [could] only arise to plague [this Court] in the future."

Finally, what Plaintiff simply ignores is that which has consistently gone into the calculation of **reasonable** foreseeability. Is it actually foreseeable that sometime, somewhere some experienced worker will use high-reaching equipment to come into contact with known overhead power lines? Of course it is: There are more than half a dozen cases of risky, foolish conduct cited in this brief alone that stand as examples to that sad fact. However, absent some basis for knowing, will Detroit Edison ever be able to predict where or when such events will occur? Even if Detroit Edison retained the services of a thousand Jeanne Dixons to predict the future on its behalf, such fortune telling could never be accomplished. How then could Detroit Edison have protected this Plaintiff from his own conduct? The only way would be for Detroit Edison to protect all potential plaintiffs from the consequences of contacting any overhead power line in any manner, regardless how unlikely such contact might be-in essence, make the system "foolproof." Yet, the technology does not exist

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[23] Indeed, even Justice Levin agreed in Groncki, Bohnert and Parcher that Detroit Edison should not have "to post armed guards twenty-four hours a day along over thirty thousand miles of uninsulated [sic] electrical lines. Nor should it be required to bury underground electrical wires at prohibitive cost and resulting excessive increase in utility costs to consumers, businesses, and others." 453 Mich 681.

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that would enable Detroit Edison to reliably deliver electric energy to the public, avoid massive power, outages and also instantly de-energize its lines to prevent harm in every possible fortuitous circumstance where someone comes into contact with its power lines. Not surprisingly, however, that is not what the law requires.

ARGUMENT II

PLAINTIFF'S ARGUMENT REGARDING THE "VOLUNTARY ASSUMPTION OF A DUTY" DOCTRINE IS UNPRESERVED AND WHOLLY WITHOUT MERIT IN ANY EVENT.

Plaintiff did not preserve this argument. Moreover, in order to successfully establish that Detroit Edison had breached a voluntarily assumed duty to him, Plaintiff would have to establish that Detroit Edison undertook to render some service or benefit **to him,** and, in addition, one of the following: (a) that Detroit Edison's failure to exercise reasonable care in doing something it was not obligated to do **increased** the risk of harm to him as compared to the risk if Detroit Edison had not acted at all; (b) that someone else owed a duty to Plaintiff and that Detroit Edison voluntarily assumed that duty, breached it, and that breach was the cause of Plaintiff's harm; or (c) that Plaintiff's harm was suffered because he relied, to his detriment, on Detroit Edison's voluntary act of undertaking an obligation that it was not otherwise bound to undertake. Smith v Allendale Mutual Ins Co, 410 Mich 685, 303 NW2d 702 (1981). Because, under the undisputed facts, Plaintiff cannot possibly establish any of these required elements, it would not have been error for the Trial Court or the

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Court of Appeals to find that this argument did not impede Detroit Edison's right to summary disposition, even if this issue had been raised in the Trial Court--which it was not.

ISSUE PRESERVATION

Plaintiff did not argue to the Trial Court that Detroit Edison, by virtue of using reclosers to protect its system from total failure upon the occurrence of a ground fault while simultaneously avoiding about 80% of the power outages that would occur if it used fused cutouts, had voluntarily assumed a duty to safeguard individuals who would otherwise be harmed by their legally unforeseeable interaction between high-reaching equipment and overhead power lines. Instead, Plaintiff has raised this issue for the first time on appeal. Consequently, this issue is unpreserved and subject to forfeiture. Booth, supra, 444 Mich 233.

STANDARD OF REVIEW

Where, as here, an issue is not properly preserved for appellate review, this Court reviews the issue only for plain error affecting substantial rights. People v Carines, 460 Mich 750, 763, 597 N.W.2d 130 (1999); Kern v Blethen-Coluni, 240 Mich App 333, 336, 612 NW2d 838 (2000). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." We say with confidence that Plaintiff does not meet any of these tests.

LEGAL DISCUSSION

In attempt to circumvent the firmly-established rule that

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Detroit Edison had no duty to anticipate the harm that befell Plaintiff under the circumstances of this case, Plaintiff now argues that Detroit Edison's use of recloser devices to protect its system constitutes a voluntary undertaking to protect persons such as him who, through legally unforeseeable circumstances, are harmed when high-profile construction equipment comes into contact with overhead power lines. In Smith, supra, this Court recognized that the common-law rule regarding the voluntary assumption of a duty applies in Michigan in general accordance with the terms of Restatement Torts, 2d, § 324A, which provides as follows:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform[24]] his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

The sine qua non of creating a triable issue of fact regarding whether Detroit Edison engaged in an undertaking sufficient to create liability under § 324A is a demonstration that Detroit Edison intended to undertake the service as a benefit to

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[24] The actual word used here in the Restatement is "protect," but that was a typographical error and this section should be read as if the word was "perform." See Smith, supra at 705 n 4.

Plaintiff.[25] Smith, supra at 715-719. See Blackwell v Citizens Ins Co, 457 Mich 662, 674, 579 NW2d 889 (1998) (explaining that the proper focus is on the "purpose" of the undertaking); Staffney v Michigan Millers Mutual Ins Co, 140 Mich App 85, 90, 362 NW2d 897 (explaining that an incidental benefit to another is insufficient to show an undertaking to render services). See also Callesen v Grand Trunk Western Railroad Co, 175 Mich App 252, 266-268, 437 NW2d 372 (1989) (explaining that the scope of the duty assumed is limited by the scope of the undertaking).

In this case, there is no dispute but that the use by Edison of recloser devices is for the protection of the system (even Plaintiff's expert admits this is so [APX, pp 93a-94a]), not for human protection. The accepted method of protecting human life from energized power lines is to insulate the lines with air space, i.e., to put them out of reasonable human reach (APX, pp 25b-26b). Indeed, it takes a fault or "over-current" situation of at least 100 amps to activate an automated recloser used in the electric utility industry. Meanwhile, it takes only 50 milliamps of current to kill a person.[26] No electric system could remain operational if it had to cut power to entire sections every time a fault of 50

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[25] In analyzing this issue, it is best to bear in mind that whether the use of reclosers directly violated a duty to Plaintiff by unreasonably creating or expanding a reasonably foreseeable risk of harm has already been addressed in Issue I(C), infra. Here, Detroit Edison addresses the separate rule that permits liability for voluntarily assuming a duty, noting that such rule "does not apply to an actor following a self-serving course of conduct." Smith, supra, 410 Mich 711.

[26] Plaintiff was not killed in this case because he did not experience a direct jolt of electricity from the downed line but, rather, experienced "gradient electricity".

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milliamps or more occurred. Further, given the nearly infinite variety of locations that an unforeseeable plaintiff might blunder into contact with overhead wires, it would be impossible to assure that such protective devices were placed "upstream" from the fault without placing large sections of the electrical grid "downstream" from the protective device (e.g., the recloser).[27] Hence, because Detroit Edison did not undertake to install the circuit-breaking device in question for the purpose of benefitting Plaintiff or similarly situated persons, he cannot avail himself of the rule from § 324A. Smith, supra, 410 Mich 711.

Moreover, even if Plaintiff could demonstrate that the recloser was installed for his benefit, Plaintiff could not establish one of the required second elements from § 324A, subparagraphs (a), (b) or (c). That is, by virtue of the recloser cutting off power within six seconds, Plaintiff was not in a worse position than he would have been had no circuit-breaking device been installed at all and the ground fault had continued unabated.[28] Additionally, there is no evidence and no suggestion

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[27] Over the 8000 square miles in which Detroit Edison serves its more than two million customers, there are multi-billion contact points at which, on any given day, it is theoretically possible that some person might find a way to come into contact with one of Detroit Edison's power transmission lines. Where, exactly, would Detroit Edison put circuit-breaking devices designed to protect human life (as opposed to protecting its system)? If there had been a 50 milliamp fuse six feet upstream from where Plaintiff severed the line, what would have stopped Plaintiff from contacting the line seven feet farther upstream? The result would be the same.

[28] As previously noted, Plaintiff relies on the opinion of his expert, who claims that the recloser aggravated Plaintiff's injuries because he received multiple shocks instead of the one shock he would have received if a fused cutout had been installed.

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in the record that some other person or entity had a duty to Plaintiff to immediately de-energize the line when it was severed and that Detroit Edison affirmatively agreed to take on such duty. Finally, there is no evidence and no suggestion in the record that Plaintiff conducted himself on the day of his injury in reliance on an assertion by Detroit Edison that it would instantly safeguard Plaintiff from power lines brought down by unforeseeable circumstances. Hence, Plaintiff's "voluntary assumption of a duty" argument is without merit. Smith, supra at 715, fn 33.

CONCLUSION AND RELIEF REQUESTED

In accordance with this Court's well-settled precedent, Detroit Edison had no duty to anticipate that the high-reaching construction equipment being operated under Plaintiff's direction might come into contact with the lines in question. Consequently, Detroit Edison had no duty to move, de-energize, better insulate, or warn Plaintiff about the danger posed by the overhead power line in question. There is no logic to Plaintiff's strained theory that Detroit Edison nevertheless had a duty not to use an automated recloser device to de-energize the line.

Plaintiff failed to preserve his "voluntary assumption of a duty" argument for appeal. Under the undisputed facts, Plaintiff cannot possibly establish any of the elements that would permit him to advance a theory that Detroit Edison breached a voluntarily

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However, that is not the test. The test is whether the recloser put Plaintiff in a worse position than if no circuit-breaking device at all was used (since Detroit Edison owed plaintiff no duty to employ such a device). Smith, supra, 410 Mich 715, fn 33.

assumed duty to safeguard him from his otherwise unforeseeable interaction with known overhead power lines. Hence, Plaintiff cannot establish plain error affecting his substantial rights.

There is value in having this appeal heard on plenary consideration. Judge Holowka's defiant act of Judicial Nullification is sought to be justified by Mr. Malcolm Harris on grounds that Groncki, Bohnert and Parcher is not precedent. A clearly worded opinion to the stare decisis effect of the trilogy will prevent that pettifoggery from being revisited in the future.

And there is great value in putting Schultz in its place as a case of liability where a frayed line is downed causing personal injury. Schultz is **not** a case where knowledgeable persons seek to excuse themselves for their own risky behavior in coming to contact with active wires with high-reaching construction equipment touching wires forty feet (40') in the air. The Supreme Court should so state.

WHEREFORE, Defendant-Appellee Detroit Edison Company respectfully requests that this Court **Affirm** the February 19, 2002 Judgment of the Court of Appeals in its entirety.

Respectfully submitted,

JOHN P. JACOBS, P.C.

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By: John P. Jacobs

John P. Jacobs (P15400)
Attorneys for Defendant-Appellee, Detroit Edison
Attorney for Detroit Edison
Suite 600, The Dime Building
719 Griswold, P.O. Box 33600
Detroit, MI 48232-5600
(313) 965-1900

JOHN P. JACOBS, P.C., ATTORNEYS AND COUNSELORS AT LAW • THE DIME BUILDING • 719 GRISWOLD STREET, SUITE 600 • DETROIT, MI 48232-5600 • (313) 965-1900